

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

MILTON LESLIE GRAY,

Defendant-Appellant.

UNPUBLISHED

February 5, 2008

No. 275848

Macomb Circuit Court

LC No. 2006-000863-FC

Before: Bandstra, P.J., and Donofrio and Servitto, JJ.

PER CURIAM.

Defendant appeals as of right from his sentence of three to 15 years imposed on his plea-based conviction of criminal sexual conduct in the third degree (CSC III), MCL 750.520d.¹ We affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

In 2006, defendant was charged with four counts of criminal sexual conduct in the first degree, MCL 750.520b, and two counts of criminal sexual conduct in the second degree, MCL 750.520c, for offenses that occurred between the dates of September 1, 1983, and May 1, 1994.

Defendant agreed to plead guilty to one added count of CSC III in return for dismissal of the original charges. The prosecutor indicated that the sentencing guidelines were “anticipated to be 36 to 60 months” in prison. Defense counsel confirmed the terms of the plea agreement. Neither party indicated that a sentencing agreement had been reached. Prior to sentencing, defendant submitted a memorandum in which he argued for a downward departure from the guidelines.²

¹ Defendant’s offense occurred prior to December 27, 1994; therefore, he has an appeal of right from his sentence. Const 1963, art 1, § 20.

² The memorandum refers to a controlled substance offense and the minimum sentence required for that offense. Defendant was not convicted of any such offense in this case.

At sentencing,³ defense counsel noted that the presentence information report indicated that the guidelines recommended a minimum term range of 36 to 72 months rather than the anticipated range of 36 to 60 months. The prosecutor explained that because the judicial sentencing guidelines applied to the offense, the correct range was 36 to 72 months.⁴ The prosecutor indicated that she would have no objection if the court relied on the range of 36 to 60 months. The prosecutor indicated to the court that the parties agreed that if defendant pleaded guilty to the reduced charge of CSC III, the remaining charges would be dismissed, and defendant would be sentenced within the guidelines of 36 to 60 months. Defense counsel indicated that the prosecutor's statement was correct, and added that he was not seeking a downward departure. The trial court sentenced defendant to 36 months to 15 years in prison, with credit for 13 days.

Defendant moved for resentencing in the trial court,⁵ arguing that the trial court imposed sentence based on inaccurate information, i.e., that the parties had reached a sentencing agreement that called for defendant to be sentenced within the guidelines. Defendant contended that the trial court acted under the mistaken belief that it was bound by such an agreement and could not depart downward from the guidelines. Defendant asserted that defense counsel rendered ineffective assistance by failing to inform the trial court that no sentence agreement existed. The trial court denied the motion.

A defendant is entitled to be sentenced based on accurate information. US Const, Am XIV; Const 1963, art 1, §§ 17, 20; *People v Triplett*, 407 Mich 510, 515; 287 NW2d 165 (1980).

To establish ineffective assistance of counsel, a defendant must show that counsel's performance fell below an objective standard of reasonableness under prevailing professional standards. Counsel must have made errors so serious that he was not performing as the "counsel" guaranteed by the federal and state constitutions. US Const, Am VI; Const 1963, art 1, § 20; *People v Carbin*, 463 Mich 590, 599; 623 NW2d 884 (2001). Counsel's deficient performance must have resulted in prejudice. To demonstrate the existence of prejudice, a defendant must show a reasonable probability that but for counsel's error, the result of the proceedings would have been different, *id.* at 600, and that the result that did occur was fundamentally unfair or unreliable. *People v Odom*, 276 Mich App 407, 415; 740 NW2d 557 (2007). Counsel is presumed to have afforded effective assistance, and the defendant bears the burden of proving otherwise. *People v Rockey*, 237 Mich App 74, 76; 601 NW2d 887 (1999).

Defendant argues that he is entitled to resentencing because his sentence was based on inaccurate information, i.e., that the parties had reached a sentencing agreement, and because

³ The trial court's court reporter prepared two versions of the sentencing transcript. The transcripts are substantially similar, but contain minor differences in wording.

⁴ The statutory sentencing guidelines apply to offenses that occurred on or after January 1, 1999. MCL 769.34(1).

⁵ Defendant filed this motion after he filed the instant claim of appeal.

defense counsel rendered ineffective assistance by failing to disabuse the trial court of this misunderstanding.

We affirm defendant's sentence. The representation made to the trial court that the parties had agreed that defendant would be sentenced within the guidelines was erroneous, but this error did not affect the calculation of the guidelines. The trial court's understanding of the minimum term range recommended by the guidelines did not change as a result of the erroneous information given to it. Cf. *People v Francisco*, 474 Mich 82, 89; 711 NW2d 44 (2006) (erroneous information resulted in statutory sentencing guidelines scoring error, which in turn altered the appropriate guidelines range). In articulating its reasons for imposing sentence, the trial court referred to the non-existent sentencing agreement when indicating that it would impose a term of incarceration. The trial court seemed somewhat reluctant to impose a term of incarceration; however, at no time did the trial court state that but for the parties' agreement, it would impose punishment other than incarceration. Defendant cannot show that the inaccurate information given to the trial court affected the sentence imposed.

Furthermore, defendant has not established that counsel rendered ineffective assistance by failing to advise the trial court that the parties had not reached a sentencing agreement. Defendant's assertion that had counsel done so, the trial court would have departed below the guidelines, is based on speculation. Defendant has not shown that counsel's error resulted in prejudice in that he has not demonstrated that but for counsel's error, it is reasonably probable that the outcome of the proceedings would have been different. *Carbin, supra*.

Affirmed.

/s/ Richard A. Bandstra
/s/ Pat M. Donofrio
/s/ Deborah A. Servitto